Supreme Court, U.S.
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No. 96-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

WASHINGTON LEGAL FOUNDATION, WILLIAM R. SUMMERS, AND MICHAEL J. MAZZONE,
Petitioners,

v.

TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION, W. FRANK NEWTON, THOMAS R. PHILLIPS, RAUL R. GONZALEZ, NATHAN L. HECHT, JOHN CORNYN, CRAIG T. ENOCH, ROSE SPECTOR, PRISCILLA R. OWEN, JAMES A. BAKER, AND GREG ABBOTT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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CROSS-PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. MAZZONE
9 Greenway Plaza
Suite 2300
Houston, TX 77046
(713) 940-6001
Pro Se

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave, NW
Washington, DC 20036
(202) 588-0302

DONALD B. AYER
THOMAS M. FISHER
JONES, DAY, REAVIS & POGUE
1450 G St., NW, Suite 700
Washington, DC 20005-2088
(202) 879-3939
Attorneys for Petitioners WLF and William R. Summers

Date: May 5, 1997

35 pp

QUESTIONS PRESENTED

1. Did the court of appeals err in determining that the guidance provided by this Court in *Hess v. Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394 (1991), regarding Eleventh Amendment immunity is applicable only to bistate entities?

2. In ruling on whether an entity created by a single State is entitled to Eleventh Amendment immunity, did the court of appeals err in determining to be irrelevant the absence of *any* evidence that money judgments against the entity would be payable from the State treasury?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 LIST

Aside from the parties named in the caption, the following were Defendants/Appellees in the Court of Appeals: Jack Hightower, Lloyd Doggett, and Bob Gammage. They were named as defendants in the complaint, in their official capacities as justices of the Texas Supreme Court. They are no longer members of the Court, having been replaced, respectively, by Greg Abbott, Priscilla R. Owen, and James A. Baker.

Petitioner Washington Legal Foundation has no parent company or nonwholly owned subsidiaries to list pursuant to Supreme Court Rule 29.6.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 8

I. The Court Should Resolve the Conflict Among the Circuits Regarding How To Evaluate Claims that an Entity Is an "Arm of the State" Entitled to Eleventh Amendment Immunity 8

A. The *Hess* Decision 10

B. Post-*Hess* Decisions in the Courts of Appeals 13

II. The Decision Below Is Inconsistent with the Decisions of This Court 16

CONCLUSION 16

TABLE OF AUTHORITIES

Page

Cases:

Bowen v. Massachusetts, 487 U.S. 879 (1988) 7
Christy v. Pennsylvania Turnpike Comm'n, 54 F.3d 1140 (3d Cir.), *cert. denied*, 116 S. Ct. 340 (1995) 9, 15
Ex parte Young, 209 U.S. 123 (1908) 20
Doe v. Lawrence Livermore Nat. Lab., 65 F.3d 771 (9th Cir. 1995), *rev'd on other grounds sub nom., Regents of University of California v. Doe*, 117 S. Ct. 900 (1997) 15
Gray v. Lewis, 51 F.3d 426 (4th Cir. 1995) 9, 10, 13
Hadley v. North Arkansas Community Techn. College, 76 F.3d 1437 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1080 (1997) 10
Harter v. Vernon, 101 F.3d 334 (4th Cir. 1996) 15
Hess v. Post Authority Trans-Hudson Corp., 115 S. Ct. 395 (1994) . . . . . *passim*
Independent Enterprises Inc. v. Pittsburgh Water and Sewer Authority, 103 F.3d 1165 (3d Cir. 1997) 15
Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) 11, 12
Mancuso v. New York State Thruway Authority, 86 F.3d 289 (2d Cir.), *cert. denied*, 117 S. Ct. 481 (1996) 9, 10, 14
Mt. Healthy City School Dist. Bd. of Education v. Doyle, 429 U.S. 274 (1977) 11
Pillsbury Co. v. Port of Corpus Christi Authority, 66 F.3d 103 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1705 (1996) 4, 8-9, 14

Regents of University of California v. Doe,
117 S. Ct. 900 (1997) 18
Seminole Tribe of Florida v. Florida,
116 S. Ct. 1114 (1996) 15
Sonnenfeld v. City and County of Denver,
100 F.3d 744 (10th Cir. 1996) 9
Thiel v. State Bar of Wisconsin,
94 F.3d 399 (7th Cir. 1996) 9, 15-16

Constitution, Statutes, and Rules:

U.S. Const., Amend. I 6
U.S. Const., Amend. V 6, 7
U.S. Const., Amend. XI . . . . . *passim*

28 U.S.C. § 1254(1) 2
42 U.S.C. § 1983 6

Texas Non-Profit Corporation Act, Vernon's Tex. Stat. Ann., Corp. Code § 1396-2.02(2), (5), & (8) . . . 18

Texas State Bar Rules, Article XI 4, 5, 20

Rules Governing the Operation of the Texas Equal Access to Justice Foundation 5, 19

Miscellaneous:

Articles of Incorporation, Texas Equal Access to Justice Foundation 5, 18

Note, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 Colum. L. Rev. 1243 (1992) 10

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

CROSS-PETITION FOR A WRIT OF CERTIORARI

Petitioners Washington Legal Foundation (WLF), William R. Summers, and Michael J. Mazzone respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on September 12, 1996. Although this petition is being filed in a timely manner pursuant to Rule 13, Petitioners wish this petition to be considered a "conditional" cross-petition under Rule 12.5 in the sense that they

desire that it be granted *only* if the Court grants the petition in No. 96-1578, which seeks review of the same court of appeals judgment that is the subject of this petition.

OPINIONS BELOW

The opinion of the court of appeals is reported at 94 F.3d 996 and is reprinted in the appendix attached to the petition filed in No. 96-1578. Phillips Pet. App. 1a-19a. The opinion of the district court (Phillips Pet. App. 20a-40a) is reported at 873 F. Supp. 1. The order of the court of appeals denying Respondents' request for rehearing and suggestion for rehearing *en banc*, and the dissenting opinion from the denial of rehearing *en banc* (Phillips Pet. App. 41a-52a) is reported at 106 F.3d 640.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1996. A timely petition for rehearing was denied on February 14, 1997. Respondents' petition seeking review of the court of appeals's judgment (No. 96-1578) was docketed on April 4, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The Eleventh Amendment to the Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens, or Subjects of any foreign State.

Selected documents promulgated by the Texas Supreme Court and the Texas Equal Access to Justice Foundation are included in the Appendix to the Petition. App. 1a-6a.

STATEMENT OF THE CASE

This petition seeks a resolution to the conflict among decisions of the U.S. Courts of Appeals regarding the scope of the Eleventh Amendment to the United States Constitution. As construed by this Court, the Eleventh Amendment provides that "States" are immune from being sued in federal court unless Congress has properly abrogated that immunity. The issue that has divided the appeals courts concerns the definition of a "State" for Eleventh Amendment purposes.

Petitioners seek review of the Fifth Circuit's decision that Respondent Texas Equal Access to Justice Foundation (TEAJF) is an arm of the State of Texas and thus entitled to Eleventh Amendment immunity. The Fifth Circuit arrived at its decision based solely on its observation that "the Texas Supreme Court created the TEAJF pursuant to its rule-making authority and the TEAJF acts on behalf of the Texas Supreme Court to carry out its role, which the Texas Supreme Court defined." Phillips Pet. App. 18a.

Contrary to the approach adopted by most other courts of appeals, the Fifth Circuit did not address the issue of whether money judgments against TEAJF would be payable out of the treasury of the State of Texas. Indeed, the Fifth Circuit has held that this Court's recent decision in *Hess v. Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394 (1994) [which held that whether money judgments against a party would be payable out of a State treasury was "the most salient factor in Eleventh Amendment determinations" (115

S. Ct. at 404)], is inapplicable to cases involving entities established by a single State but rather is "a limited holding addressing the standard to be applied to *bistate* entities . . ." *Pillsbury Co. v. Port of Corpus Christi Authority,* 66 F.3d 103, 104 (5th Cir. 1995)(emphasis added), *cert. denied,* 116 S. Ct. 1705 (1996).

IOLTA in Texas. Petitioners' underlying lawsuit involves a constitutional challenge to the Texas IOLTA ("Interest on Lawyers' Trust Accounts") program. Under that program, funds belonging to certain individuals doing business in Texas are used -- without the consent and usually without the knowledge of those individuals -- to generate interest for a variety of legal services programs. Petitioners contend that the IOLTA program violates their rights under the First and Fifth Amendments.

The Texas ICLTA program was established by the Texas Supreme Court in 1984. By order effective May 9, 1984, the Supreme Court of Texas amended the State Bar Rules in order to create the Texas Equal Access to Justice Program (the "IOLTA program"). The amendments, codified as Article XI of the State Bar Rules, provided that an attorney receiving clients funds that were "nominal in amount" or were "reasonably anticipated to be held for a short period of time" was permitted to place the funds into an unsegregated interest-bearing bank account (an "IOLTA account") and to pay interest on those funds to a nonprofit corporation to be established by the Supreme Court of Texas. Article XI further provided that the nonprofit corporation was to be governed by a board of directors consisting of a chairman and twelve members. The chairman and six directors were to be appointed by the Texas Supreme Court and the other six directors were to be appointed by the president of the State Bar of Texas.

In order to implement Article XI, the Supreme Court of Texas by order dated April 30, 1984 adopted its "Rules Governing the Operation of the Texas Equal Access to Justice Program" (the "IOLTA Rules"). The IOLTA Rules provided, *inter alia,* that the nonprofit corporation whose creation was mandated by Article XI was to be the Texas Equal Access to Justice Foundation (TEAJF). The IOLTA Rules specified that funds forwarded to TEAJF from IOLTA accounts were to be awarded as grants solely to nonprofit organizations that "have as a primary purpose the delivery of legal services to low-income persons."

Articles of Incorporation for TEAJF were filed with the Office of the Secretary of State of Texas on January 11, 1985. Article Four of the Articles of Incorporation provides, *inter alia,* that TEAJF "shall have and exercise all rights and powers now or hereafter conferred on nonprofit corporations under the laws of Texas." Relevant portions of the most up-to-date versions of Article XI, the IOLTA Rules, and the Articles of Incorporation are reproduced in the Appendix. App. 1a-6a.

On December 13, 1988, the Texas Supreme Court amended Article XI and the IOLTA Rules in order to make participation in the IOLTA program mandatory. Phillips Pet. App. 3a-4a. Pursuant to the amended Article XI and the amended IOLTA Rules, attorneys in Texas who hold "client funds that are nominal in amount or are reasonably anticipated to be held for a short period of time" *must* place the funds in an unsegregated interest-bearing account, with interest earned thereon payable to TEAJF. *Id.* at 5a.

Proceedings Below. Petitioners filed suit on February 7, 1994, in U.S. District Court for the Western District of Texas, challenging the constitutionality of the Texas

IOLTA program. Named as defendants were: (1) TEAJF; (2) W. Frank Newton, in his official capacity as Chairman of TEAJF; and (3) the nine justices on the Texas Supreme Court, in their official capacities as justices (the "Justices"). Petitioners sought declaratory and injunctive relief against continuation of the IOLTA program, arguing that the program violated their Fifth Amendment rights by taking property without just compensation, and violated their First Amendment rights by forcing them to support ideological causes with which they disagree. Petitioners also sought a refund from TEAJF of all interest earned on their money placed into IOLTA trust accounts.

On December 4, 1994, Respondents TEAJF and Newton filed a motion for summary judgment, as did the Justices. Respondents argued that they were entitled to judgment as a matter of law on the First and Fifth Amendment issues, and also argued that they were immune from suit under the Eleventh Amendment and because they were not "persons" within the meaning of 42 U.S.C. § 1983. In response to the Eleventh Amendment argument, Petitioners cited this Court's *Hess* decision and asserted that TEAJF should not be considered an arm of the State of Texas in the absence of evidence that the Texas treasury would be liable for any money judgments entered against TEAJF.

On January 19, 1995, the district court granted Respondents' motions for summary judgment and denied petitioners' cross-motion for summary judgment. Phillips Pet. App. 20a-40a. Although the district court held that Respondents were entitled to judgment as a matter of law on the merits of Petitioners' constitutional claims, it nonetheless addressed Respondents' Eleventh Amendment arguments. The district court held that TEAJF was entitled to Eleventh Amendment immunity from suit because it was

an "arm" of the State of Texas. *Id.* at 38a. It made that determination without reference to *Hess* or Texas's potential liability for TEAJF's debts; rather, it held, "[A]n entity [*i.e.*, TEAJF] whose role is completely defined by the state supreme court, which acts as the agent of the court, occupies the position of a public agency for purposes of Eleventh Amendment analysis." *Id.*

Petitioners appealed to the Fifth Circuit. Petitioners again based their Eleventh Amendment argument on *Hess*, asserting that TEAJF is not part of the Texas state government.[1] Petitioners noted that TEAJF is established as a separate corporation under Texas law, and that Respondents had introduced no evidence that the Texas treasury would be liable for judgments entered against TEAJF.

On September 12, 1996, the court of appeals vacated in part and affirmed in part. *Id.* at 1a-19a. The court rejected the premise upon which the district court had dismissed Petitioners' constitutional claims -- that "clients do not have a valid property interest in the interest proceeds on funds in IOLTA accounts." *Id.* at 17a. Accordingly, the court vacated the award of summary judgment for Respondents and the denial of summary judgment for

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[1] Petitioners also argued that the Eleventh Amendment should not bar their claim for a refund of interest paid into the IOLTA program, for the additional reason that such a claim should not be considered a claim for "damages" for Eleventh Amendment purposes. Petitioners argued that courts have traditionally distinguished between damages claims and claims for equitable restitution (*see, e.g., Bowen v. Massachusetts*, 487 U.S. 879 (1988)), and that the Eleventh Amendment should not bar the latter type of claims. Indeed, if the Eleventh Amendment were held to bar efforts to recover seized property, the Fifth Amendment's Takings Clause would be rendered a nullity with respect to uncompensated takings by a state government.

Petitioners, and remanded the case to the district court for further proceedings. *Id.* at 19a.

However, in an abbreviated section of its opinion, the appeals court affirmed with respect to Eleventh Amendment issues. The court held that Eleventh Amendment immunity extends to TEAJF because "the Texas Supreme Court created the TEAJF pursuant to its rule-making authority and the TEAJF acts on behalf of the Texas Supreme Court to carry out its role, which the Texas Supreme Court defined." *Id.* at 18a. The court did not cite *Hess*[2] and did not discuss whether any damages assessed against TEAJF could be payable from the Texas treasury.

On February 14, 1997, the Fifth Circuit denied Respondents' petitions for rehearing and suggestions for rehearing *en banc,* with six judges dissenting from the denial of rehearing *en banc.* *Id.* at 41a-52a.

REASONS FOR GRANTING THE PETITION

I. The Court Should Resolve the Conflict Among the Circuits Regarding How To Evaluate Claims that an Entity Is an "Arm of the State" Entitled to Eleventh Amendment Immunity

The Court last addressed the issue of how to evaluate claims that an entity is an "arm of the state" entitled to Eleventh Amendment immunity in *Hess v. Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394 (1994). Subsequent

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[2] That omission was unsurprising, given the Fifth Circuit's prior determination in *Pillsbury* that *Hess* is inapplicable to Eleventh Amendment immunity issues involving entities established by a single state.

court of appeals decisions have diverged wildly in their interpretations of *Hess*. The Fifth Circuit has taken the position that *Hess* applies only to bistate entities (entities created by compacts entered into between two states) and has no relevance to the Eleventh Amendment immunity of entities (such as TEAJF) created by a single state. *Pillsbury Co. v. Port of Corpus Christi Authority*, 66 F.3d 103, 104 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1705 (1996). Thus, the Fifth Circuit did not even cite *Hess* in its evaluation of Respondents' Eleventh Amendment claims. Nor did its analysis take into account what *Hess* cited as "the most salient factor in Eleventh Amendment determinations" (*Hess*, 115 S. Ct. at 404): whether money judgments against the party seeking immunity would be payable out of a State treasury.

In direct conflict with the Fifth Circuit, at least four other courts of appeals have held explicitly that *Hess is* applicable to single-state entities and mandates that impact on State treasuries weigh heavily in deciding Eleventh Amendment issues. *Mancuso v. New York State Thruway Authority*, 86 F.3d 289, 293 (2d Cir.), *cert. denied*, 117 S. Ct. 481 (1996); *Christy v. Pennsylvania Turnpike Comm'n*, 54 F.3d 1140 (3d Cir.), *cert. denied*, 116 S. Ct. 340 (1995); *Gray v. Lewis*, 51 F.3d 426, 431-33 (4th Cir. 1995); *Sonnenfeld v. City and County of Denver*, 100 F.3d 744, 749 (10th Cir. 1996).

The Seventh Circuit, while acknowledging the applicability of *Hess* in the context of single-state entities, has held that whether money judgments would be payable out of a State treasury is a factor of lesser importance in the Eleventh Amendment analysis. *Thiel v. State Bar of Wisconsin*, 94 F.3d 399, 401 (7th Cir. 1996)("effect on the state treasury" is a less important factor than: (1) the ex-

tent of state control over the entity in question; and (2) whether the entity acted as the State's "agent" in undertaking the challenged action). The Eighth Circuit appears to have taken a position somewhere in the middle. *Hadley v. North Arkansas Community Techn. College,* 76 F.3d 1437, 1443 (8th Cir. 1996), *cert. denied,* 117 S. Ct. 1080 (1997).

Virtually all of the appeals courts have expressed confusion regarding how *Hess* should be applied. *See, e.g., Mancuso,* 86 F.3d at 293 ("The jurisprudence over how to apply the arm-of-the-state doctrine is, at best, confused"); *Gray,* 51 F.3d at 433; *Hadley,* 76 F.3d at 1443 (Lay, J., dissenting)("Today's decision amplifies the disarray of approaches applied by lower courts when confronted with the defense of Eleventh Amendment immunity by state-created entities.").

New York's Attorney General echoed those concerns in asking the Court to review the Second Circuit's *Mancuso* decision. *See* Petition for Writ of Certiorari at 14-15, *New York State Thruway Authority v. Mancuso,* No. 96-381. Commentators have noted the absence of any coherent approach by the appeals courts to these types of Eleventh Amendment issues. *See* Note, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine,* 92 Colum. L. Rev. 1243 (1992). Additional guidance from the Court is urgently needed in order resolve the conflicts among the appeals courts.

A. The *Hess* Decision

The Court has consistently recognized that the Eleventh Amendment provides States with immunity from suit in the federal courts. The Court has also recognized, however,

that not every entity exercising state power qualifies for Eleventh Amendment immunity, which is reserved for entities that are "one of the United States." The Court has not, for example, extended immunity to political subdivisions such as counties and municipalities, even though such subdivisions are creatures of State government and derive their power from the States. *Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. 274 (1977). In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), the Court listed several factors relevant in determining whether an entity created by a State was entitled to Eleventh Amendment immunity, including: (1) whether any judgment against the entity would be payable from the State treasury (*Lake Country*, 440 U.S. at 401); (2) whether the entity is "comparable to a county or municipality" (*id.*); (3) whether the entity's charter describes the entity as a "separate legal entity" (*id.*); (4) whether the entity's governing officials are appointed by state officials (*id.*); (5) whether funding for the entity is provided by the State (*id.* at 401-02); (6) whether the function performed by the entity is one traditionally performed by State governments or local governments (*id.* at 402); and (7) whether the entity's "authority to make rules within its jurisdiction is subject to veto at the State level." *Id.*

Not surprisingly, this multi-factor test for assessing Eleventh Amendment immunity resulted in widely disparate views, among the courts of appeals, on the scope of that immunity. The issue came before the Court again in *Hess* after the Second and Third Circuits reached opposite conclusions regarding the Eleventh Amendment immunity of Port Authority Trans-Hudson Corp. ("PATH"), a subsidiary of a bistate entity created as a result of a compact entered into between New York and New Jersey. Both the

majority and dissenting opinions recognized that the Court's prior decisions provided little guidance when the numerous indicators of immunity recited in *Lake Country* "point in different directions." *Hess,* 115 S. Ct. at 404; *id.* at 409 (O'Connor, J., dissenting).

In an effort to provided more precise guidance to lower courts, the Court explained that "the Eleventh Amendment's twin reasons for being remain our prime guide" on immunity issues. *Id.* at 404. It identified those "twin reasons for being" as: (1) "the States' fears that 'federal courts would force them to pay their Revolutionary war debts, leading to their financial ruin'"; and (2) a recognition that the States maintain certain attributes of sovereignty and thus are entitled to respect as members of the federation. *Id.* at 400 (internal citations omitted). The Court determined that, at least in the context of a bistate entity, denying immunity is not disrespectful of the States' status within our federal system, and thus that "the most salient factor in Eleventh Amendment determinations" is whether any judgment against the entity is payable from State treasuries. *Id.* Finding no evidence that either New Jersey or New York would be forced to pay judgments against PATH, the Court ruled that PATH was not entitled to Eleventh Amendment immunity. *Id.* at 404-05.

The Court rejected PATH's (and the dissent's) suggestion that Eleventh Amendment immunity should turn on the degree of control wielded by a State over the entity in question. The Court noted that "ultimate control of every state-created entity resides with the State for the State may destroy or reshape any unit it creates" and yet the Court has never extended immunity to such state-created entities as cities and counties. *Id.* at 404. The Court also stated that basing immunity on the degree of "control" would "not

home in on the impetus for the Eleventh Amendment: the prevention of federal court judgments that must be paid out of a State's treasury." *Id.*

While *Hess* provided considerable guidance to the appeals courts regarding arm-of-the-state immunity issues, it left many unanswered questions. Most fundamentally, it did not state definitively whether its approach was at all relevant to single-state entities such as TEAJF. The Fourth Circuit recently noted some of the other questions left unanswered by *Hess:*

> [*Hess*] did not offer any guidance as to how to apply any of the various factors in th[e] context [of a single-state entity], or for that matter in the multistate context. For example, . . . although the Court identified protection of state treasuries and respect for state sovereignty as the "prime guide[s]" when the various factors are in conflict, *id.* [at 404], it did not ascribe relative weights to these factors or explain the interrelationship of these two considerations. Finally, the Court explained neither when nor how the other "relevant considerations" factor into the central inquiry into the action's effect on the state's treasury and sovereignty.

Gray, 51 F.3d at 433.

B. Post-*Hess* Decisions in the Courts of Appeals

As noted previously, the Fifth Circuit -- both in this case and in other decisions -- has departed radically from the post-*Hess* approach of other appeals courts to Eleventh Amendment immunity issues. The Fifth Circuit has held flatly that the standards enunciated in *Hess* for evaluating

the Eleventh Amendment claims of state-created entities apply only to bistate entities such as PATH. *Pillsbury,* 66 F.3d at 104. In this case, the court ignored *Hess* and looked *only* to the degree of control exercised over TEAJF by the Texas Supreme Court in determining that TEAJF is an arm of the State of Texas. The court found determinative that TEAJF "acts on behalf of the Texas Supreme Court to carry out its role," a role "defined" by the Texas Supreme Court. Phillips Pet. App. 18a. The court did not consider Petitioners' claims that the State of Texas would not be liable for judgments entered against TEAJF; indeed, Respondents did not attempt to argue that the State of Texas *would* be liable.

Numerous post-*Hess* appeals court decisions directly conflict with the Fifth Circuit's approach. In *Mancuso,* for example, the Second Circuit held that the New York State Thruway Authority -- an entity established by New York State to operate a major public highway system -- was not entitled to Eleventh Amendment immunity, primarily because New York would not be liable for any judgments against the authority. *Mancuso,* 86 F.3d at 289. The Second Circuit denied immunity despite indicia of state control over the Authority that were far more numerous than those present here -- *e.g.*, all members of the Authority were appointed by New York's Governor, New York provided an initial appropriation to the Authority and guaranteed its initial bond offering, and the function served by the Authority (a state-wide highway system) is one that "a state would normally provide." *Id.* at 295. In contrast, only half of TEAJF's directors are appointed by the Texas Supreme Court, TEAJF has never received a penny in funding or guarantees from the Texas Supreme Court, and funding for legal services programs is not a function traditionally provided by state governments in particular.

(Indeed, the Texas legislature has repeatedly declined requests to provide funding to organizations providing legal assistance to indigents in civil proceedings.)

The decision below also directly conflicts with decisions of the Third Circuit, which relied primarily on the "State treasury" factor to deny Eleventh Amendment immunity to a state-created turnpike authority subject to considerable state control (*Christy*, 54 F.3d at 1145-46) and to a water and sewer authority. *Independent Enterprises Inc. v. Pittsburgh Water and Sewer Authority,* 103 F.3d 1165 (3d Cir. 1997).

The decision below also directly conflicts with decisions of the Fourth Circuit, which relied primarily on the "State treasury" factor to vacate a grant of Eleventh Amendment immunity to a health department (*Gray,* 51 F.3d at 433-34) and to deny immunity to a sheriff's department. *Harter v. Vernon,* 101 F.3d 334 (4th Cir. 1996). *See also Doe v. Lawrence Livermore Nat. Laboratory,* 65 F.3d 771, 774 (9th Cir. 1995)(holding -- in a case involving a single-state entity -- that "State liability for money judgment is the single most important factor in determining whether an entity is an arm of the state," without citing to *Hess*), *rev'd on other grounds sub nom., Regents of University of California v. Doe,* 117 S. Ct. 900 (1997).

In contrast, the Seventh Circuit largely agreed with the Fifth Circuit's approach in upholding the Eleventh Amendment immunity of the Wisconsin State Bar. The appeals court suggested that the force of *Hess* may have been undercut somewhat by the Court's more recent decision in *Seminole Tribe of Florida v. Florida,* 116 S. Ct. 1114 (1996). *Thiel,* 94 F.3d at 401. While acknowledging that *Hess* made clear that the "State treasury" factor is relevant

to Eleventh Amendment immunity issues involving both bi-state and single-state entities, the appeals court said that the "State treasury" factor is the *least* important of three factors to be considered. *Id.* The court stated that the two more important factors are the extent of "control" exercised by a State over the entity in question and whether the entity was acting as the State's "agent" when it took the disputed action. *Id.* Finding that the Wisconsin Supreme Court exercises significant day-to-day control over the activities of the Wisconsin State Bar and that the State Bar was acting as the Wisconsin Supreme Court's agent in enforcing rules promulgated by the court, *Thiel* held that the Wisconsin State Bar was entitled to Eleventh Amendment immunity -- regardless whether any judgments against the State Bar would be payable out of the State treasury. *Id.* at 402-03.

Review by this Court is warranted to resolve the sharply conflicting approaches employed by the courts of appeals in Eleventh Amendment arm-of-the-state cases. The Court needs to make clear whether *Hess*'s primary reliance on the "State treasury" factor has any application in cases involving single-state entities; and if so, how the "State treasury" factor is to be balanced against the other "twin reason for being" of the Eleventh Amendment identified by *Hess* (115 S. Ct. at 404): respect for state sovereignty.

II. The Decision Below Is Inconsistent with the Decisions of This Court

Review is warranted for the additional reason that the Fifth Circuit's decision is so plainly inconsistent with this Court's decisions. Even assuming that the *Hess* analysis is not strictly applicable to single-state entities, decisions issued both before and after *Hess* make clear that a State's liability for judgments entered against an entity is of at

least *some* relevance to the entity's Eleventh Amendment immunity. Accordingly, it was reversible error for the Fifth Circuit to grant immunity to TEAJF in the absence of *any* evidence that Texas would be liable for judgments against TEAJF and without even considering the relevance of the absence of such evidence. Moreover, even if one were to adopt the approach of the *Hess* dissenters and base the Eleventh Amendment determination on the extent of control exercised by Texas over TEAJF, the evidence is uncontradicted that the Texas Supreme Court exercises virtually no control over TEAJF's day-to-day activities. Accordingly, under virtually any conceivably applicable Eleventh Amendment standard, the court of appeals erred in bestowing Eleventh Amendment immunity to TEAJF.

The court of appeals's analysis was plainly inconsistent with *Hess*. In arriving at its conclusion that immunity was warranted, the court cited only three factors: (1) the Texas Supreme Court created TEAJF; (2) the Texas Supreme Court "defined" TEAJF's role; and (3) TEAJF "acts on behalf of the Texas Supreme Court" in carrying out that role. Phillips Pet. App. 18a. But those same three factors could be cited with respect to virtually *any* entity created by a State, and (as noted above) the Court has never granted blanket immunity to all state-created entities. The Port Authority of New York and New Jersey, for example, was created by New York and New Jersey to carry out a very specific role assigned to it by those States (to better coordinate "the terminal, transportation and other facilities of commerce in, about and through the port of New York"). Yet *Hess* rejected the notion that the Port Authority's status as a state-created entity with a specialized function was sufficient to render it immune from federal-court suit under the Eleventh Amendment.

Hess instead chose as the Court's "prime guide" the Eleventh Amendment's "twin reasons for being": concern for the State treasury and concern for state sovereignty. *Hess,* 115 S. Ct. at 394, 404. Even if one assumes that *Hess* is not strictly applicable to single-state entities, the Court made clear in a subsequent decision that a State's liability for judgments against a single-state entity is highly relevant in determining the entity's Eleventh Amendment immunity. *See Regents of University of California v. Doe,* 117 S. Ct. 900, 904 (1997)(enforceability against a State of a money judgment against a state instrumentality "is of considerable importance to *any* evaluation" of Eleventh Amendment immunity)(emphasis added). Accordingly, it was clear error for the Fifth Circuit not to consider TEAJF's failure to present evidence (and their failure even to argue) that Texas would be liable for any money judgment entered against TEAJF.

Indeed, all record evidence indicates that Texas would not be so liable. TEAJF is a separately incorporated entity authorized to "exercise all rights and powers now or hereafter conferred on nonprofit corporations under the laws of Texas." TEAJF Articles of Incorporation, Article Four; App. 5a. Such powers include the power "[t]o sue and be sued, complain and defend, in its corporate name"; "[t]o sell, convey, mortgage, pledge, lease, exchange, transfer, and otherwise dispose of all or any part of its property and assets"; and "[t]o make contracts and incur liabilities." Texas Non-Profit Corporation Act, Vernon's Tex. Stat. Ann. Corporations Code § 1396-2.02(2), (5), & (8). Texas has never provided any State funds to TEAJF, not even to assist with setting up the corporation. Rather, TEAJF has derived its revenues from interest earned on privately-owned IOLTA accounts. The IOLTA Rules explicitly contemplate that TEAJF's expenses are to be paid from its

interest income -- Rule 18 provides: "the Foundation may expend funds for administrative costs of the Program, including any costs incurred after April 30, 1984, and may provide a reasonable reserve for administrative costs." App. 4a. There is no evidence that TEAJF has ever looked anywhere other than its own revenues for payment of its grants and expenses. In the absence of evidence that TEAJF has looked to Texas for payment of its expenses in the past, and given TEAJF's powers to enter into contracts, to incur debt, and to sue and be sued in its own name, there is no basis for concluding that the State of Texas would be liable for any money judgment entered against TEAJF in this case.

Nor is it any answer to assert that a judgment against TEAJF is, in effect, a judgment against the State in the sense that every dollar taken from TEAJF is one more dollar that Texas must expend to meet its social services obligations. *Hess* rejected just such an argument, reasoning:

> A charitable organization may undertake rescue or other good work which, in its absence, we would expect the State to shoulder. But none would conclude, for example, that in times of flood or famine the American Red Cross, to the extent it works for the public, acquires the States' Eleventh Amendment immunity. The proper focus is not on the use of profits or surplus, but rather is on losses and debt. If the expenditures of the enterprise exceed receipts, is the State in fact obligated to bear and pay the resulting indebtedness of the enterprise? When the answer is "No" -- both legally and practically -- then the Eleventh Amendment's core concern is not implicated.

Hess, 115 S. Ct. at 406.

Nor does the second of the Eleventh Amendment's "twin reasons for being" (*id.* at 404) -- concern for state sovereignty -- favor a grant immunity to TEAJF. Because suit for injunctive relief against TEAJF's Chairman in his official capacity is permissible under *Ex parte Young*, 209 U.S. 123 (1908), the propriety of TEAJF's past conduct is already subject to federal-court scrutiny. Accordingly, there is at most a very minor affront to Texas's sovereignty when a state-created (but not closely controlled) corporation already subject to suit (through its Chairman) for injunctive relief finds itself subject to suit for money damages as well. That is particularly true when the "damages" claim consists solely of an effort by individuals to reclaim several hundred dollars in interest income alleged to have been seized from them by the corporation.

Moreover, the Fifth Circuit's decision was clearly wrong even if one accepts the views of the four *Hess* dissenters. Rather than focusing on the "State treasury" factor, the dissenters would have focused their Eleventh Amendment analysis on the extent to which the State government exercises "immediate control and oversight" over the State-created entity and "retains veto or approval power over an entity's undertakings." *Hess*, 115 S. Ct. at 411 (O'Connor, J., dissenting). The record evidence indicates that the Texas Supreme Court exercises very little "immediate control" over TEAJF. While the Texas Supreme Court has provided general guidelines to TEAJF regarding how grant funds are to be expended (App. 2a), it has never attempted to override TEAJF's decisions regarding which IOLTA grants are to be approved, or to approve or disapprove of TEAJF's annual budget. While Texas can exercise some degree of oversight over TEAJF's

activities by virtue of its power to appoint its directors, even there its control is somewhat limited since it gets to name only six of TEAJF's 12 directors, plus its chairman. The other six directors are named by the President of the State Bar of Texas. App. 2a.

In sum, the Fifth Circuit's analysis of Eleventh Amendment arm-of-the-state issues is plainly inconsistent with the recent pronouncements of this Court. That inconsistency provides an additional reason for reviewing the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL J. MAZZONE
9 Greenway Plaza
Suite 2300
Houston, TX 77046
(713) 940-6001
Pro Se

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave, NW
Washington, DC 20036
(202) 588-0302

DONALD B. AYER
THOMAS FISHER
JONES, DAY, REAVIS & POGUE
1450 G St., NW, Suite 700
Washington, DC 20005-2088
(202) 879-3939
Attorneys for Petitioners WLF and William R. Summers

Date: May 5, 1997

APPENDICES

TABLE OF CONTENTS

Appendix A (Excerpts from Texas State Bar Rules, Article XI, "Interest Earned on Client Funds Held by Attorneys") 1a

Appendix B (Excerpts from "Rules Governing the Operation of the Texas Equal Access to Justice Program") 4a

Appendix C (Excerpts from "Articles of Incorporation of Texas Equal Access to Justice Foundation") 5a

APPENDIX A

EXCERPTS FROM TEXAS STATE BAR RULES, ARTICLE XI: "INTEREST EARNED ON CLIENT FUNDS HELD BY ATTORNEYS"

SECTION 1. SHORT TITLE

This article may be referred to as the Texas Equal Access to Justice Program.

* * *

SECTION 3. RULES

This Court shall hereinafter promulgate rules, consistent with the provisions of this Article, that are necessary and appropriate to carry out the purposes of this Article and conform the program created as provided by this Article to applicable statutes, regulations, and rulings. The rules, which may be amended or revoked by this Court from time to time as it deems necessary to carry out this Article, shall provide for:

(A) The formation of a corporation, incorporated without members under the Texas Non-Profit Corporation Act (Tex.Rev.Civ.Stat.Ann. art. 1396-1.01 *et seq.*), to be the recipient of and disbursing agent for interest earned on client funds as provided by this Article;

* * *

SECTION 4. PROVISIONS RELATING TO THE NONPROFIT CORPORATION

(A) The nonprofit corporation provided for in this Article shall be organized in such a manner as to be exempt from federal income taxation under the Internal Revenue Code of 1954, or any subsequent internal revenue law.

(B) The exclusive purpose of the nonprofit corporation provided for in this Article shall be to grant funds received by it, as provided in this Article, to organizations that will use the funds exclusively to provide legal services to the indigent in civil matters.

(C) The nonprofit corporation provided for in this Article shall be governed by a board of directors consisting of a chairman and twelve members. The chairman and six directors shall be persons appointed by this Court and the other six directors shall be persons appointed by the president of the State Bar of Texas, with the approval of the board of directors of the State Bar of Texas. At least two of each group of appointees to the board of directors, other than the chairman, shall not be attorneys, and shall not have, other than as consumers, a financial interest in the practice of law.

* * *

(I) The nonprofit corporation provided for in this Article may expend funds for administrative costs of the program, including any costs incurred after the adoption of this Article, and may provide a reasonable reserve for administrative costs.

* * *

SECTION 8. LIABILITY OF NONPROFIT CORPORATION

If client funds that are neither nominal in amount nor on deposit for a short period of time are deposited under Section 5(A) of this Article, the liability of the nonprofit corporation provided in this Article may not exceed the amount of interest attributable to client funds actually paid by the depository to the nonprofit corporation.

SECTION 9. INITIAL DISTRIBUTION OF FUNDS

The initial distribution of funds under this Article shall be made at a time when, in the determination of the board of directors of the nonprofit corporation provided for in this Article, there are sufficient funds to provide an adequate distribution.

APPENDIX B

EXCERPTS FROM "RULES GOVERNING THE OPERATION OF THE TEXAS EQUAL ACCESS TO JUSTICE PROGRAM"

RULE 1. ESTABLISHMENT OF THE TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION

The Texas Equal Access to Justice Program (the "Program"), Article XI of the State Bar Rules adopted and promulgated by the Supreme Court of Texas by Order dated April 30, 1984, shall be administered by the Texas Equal Access to Justice Foundation (the "Foundation"), a Texas Non-Profit Corporation.

* * *

RULE 18. ADMINISTRATIVE COSTS OF FOUNDATION

The Foundation may expend funds for administrative costs of the Program, including any costs incurred after April 30, 1984, and may provide a reasonable reserve for administrative costs.

* * *

RULE 20. INITIAL DISTRIBUTION OF FUNDS BY THE FOUNDATION

The initial distribution of funds under the Program shall be made at a time, when, in the determination of the Board of Directors of the Foundation, there are sufficient funds to provide an adequate distribution.

APPENDIX C

EXCERPTS FROM ARTICLES OF INCORPORATION OF TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION

ARTICLE ONE NAME

The name of the corporation is the Texas Equal Access to Justice Foundation.

ARTICLE TWO NONPROFIT CORPORATION

The corporation is a nonprofit corporation.

ARTICLE THREE DURATION

The period of its duration is perpetual.

ARTICLE FOUR PURPOSE

The exclusive purpose for which the corporation is organized is to grant funds received by it to organizations that will use such funds exclusively to provide legal services to the indigent in civil matters.

The corporation shall have and exercise all rights and powers now or hereafter conferred on nonprofit corporations under the laws of Texas; provided, however, that the corporation shall not, except to an insubstantial degree, engage in any activities or exercise any powers that are not in furtherance of the purposes of the corporation.

* * *

ARTICLE EIGHT ADDITIONAL PROVISIONS

* * *

(4) Upon dissolution of the corporation or the winding up of its affairs, the assets of the corporation shall be distributed exclusively to charitable, religious, scientific, literary, or educational organizations in this State which would then qualify under the provisions of Section 501(c)(3) of the Code and which at that time have a purpose similar to that of the corporation.

No. 96-1766

Supreme Court, U.S.
FILED
JUN 3 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

HON. THOMAS R. PHILLIPS, HON. RAUL A. GONZALEZ, HON. JACK HIGHTOWER, HON. NATHAN L. HECHT, HON. LLOYD DOGGETT, HON. JOHN CORNYN, HON. BOB GAMMAGE, HON. CRAIG T. ENOCH, HON. ROSE SPECTOR, TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION, AND W. FRANK NEWTON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION,

Petitioners,

v.

WASHINGTON LEGAL FOUNDATION, WILLIAM R. SUMMERS, AND MICHAEL J. MAZZONE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI

NANCY TREASE
Office of the Attorney General of Texas
P.O. Box 12548, Capitol Station
Austin, TX 78711
(512) 475-4075

Attorneys for Petitioners Hon. Thomas R. Phillips, Hon. Raul A. Gonzalez, Hon. Jack Hightower, Hon. Nathan L. Hecht, Hon. Lloyd Doggett, Hon. John Cornyn, Hon. Bob Gammage, Hon. Craig T. Enoch, and Hon. Rose Spector

DARRELL E. JORDAN
H. ROBERT POWELL*
BRITTAN L. BUCHANAN
DAVID J. SCHENCK
BETH W. BIVANS
HUGHES & LUCE, L.L.P.
111 Congress, Suite 900
Austin, TX 78701
(512) 482-6800

Attorneys for Petitioners Texas Equal Access to Justice Foundation, and W. Frank Newton, in His Official Capacity as Chairman of the Texas Equal Access to Justice Foundation

*Counsel of Record

June 3, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

1. Did the Fifth Circuit err by holding that the Texas Equal Access to Justice Foundation, an entity created by the Texas Supreme Court to operate in a manner directed by the Rules of that Court, is an arm-of-the-state entitled to immunity under the Eleventh Amendment in a suit challenging the Order of the Texas Supreme Court that brought the Foundation into existence?

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

INTRODUCTION AND SUMMARY 3

1. The Fifth Circuit Did Not Reject *Hess* 4

2. Neither the Fifth Circuit's Holding Nor Those Cited By the Cross-Petitioners are in Conflict With Any Other Decision 6

3. Cross-Petitioners' Actual Argument Is Not Worthy of Review 9

4. This Court has Already Applied the *Hess* Factors to Single-State Entities 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Bates v. State Bar of Ariz., 433 U.S. 350 (1977) 6

Bender v. Williamsport Area Sch. Dist., 475 U.S. 534 (1986) 10

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 11

Christy v. Pennsylvania Turnpike Comm'n, 54 F.3d 1140 (3d Cir.), *cert. denied*, ___ U.S. ___, 116 S. Ct 340 (1995) 8

Delahoussaye v. City of New Iberia, 937 F.2d 144 (5th Cir. 1991) 5

Gray v. Laws, 51 F.3d 426 (4th Cir. 1995) 8

Green v. State Bar of Tex., 27 F.3d 1083 (5th Cir. 1994) 5

Hadley v. North Arkansas Community Technical College, 76 F.3d 1437 (8th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 1080 (1997) 8

Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 115 S. Ct. 394 (1994) ..... *passim*

Holly Farms Corp. v. NLRB, ___ U.S. ___, 116 S. Ct. 1396 n.7 (1996) 11

Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 1171 (1979) 7

Lewis v. Louisiana State Bar Ass'n, 792 F.2d 493 (5th Cir. 1986) 6

Mancuso v. New York State Thruway Auth., 86 F.3d 289 (2d Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 481 (1996) 8

TABLE OF AUTHORITIES – Continued

Page

Morris v. Washington Metro. Transit Auth., 781 F.2d 218 (D.C. Cir. 1986) 10

O'Connor v. State Bar of Nev., 686 F.2d 749 (9th Cir.), *cert. denied*, 459 U.S. 1071 (1982) 6

Pillsbury Co. v. Port of Corpus Christi Authority, 66 F.3d 103 (5th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1705 (1996) 4

Regents of Univ. of Cal. v. Doe, ___ U.S. ___, 117 S. Ct. 900 (1997) 3, 8, 11

Seminole Tribe of Fla. v. Florida, ___ U.S. ___, 116 S. Ct. 1114 (1996) 4, 8, 9

Sonnenfeld v. City & County of Denver, 100 F.3d 744 (10th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3572 (U.S. May 19, 1997) (No. 96-1296) 8

Thiel v. State Bar of Wis., 94 F.3d 399 (7th Cir. 1996) ...6, 7

OTHER

Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine, 92 Colum. L. Rev. 1243 (1992) 8

Carlos M. Vazquez, *What is Eleventh Amendment Immunity*, 106 Yale L. J. 1683, 1806 (1997) 10

STATEMENT OF THE CASE

This opposition is submitted by the Justices of the Supreme Court of Texas, the Texas Equal Access to Justice Foundation ("TEAJF") and W. Frank Newton in his official capacity as Chairman of the Texas Equal Access to Justice Foundation (collectively "Petitioners") in response to the Cross-Petition for a Writ of Certiorari filed by the Washington Legal Foundation and other cross petitioners (collectively "Cross-Petitioners").

The case is a challenge to the existence of the Texas IOLTA ("Interest on Lawyer's Trust Account") program established by order of the Texas Supreme Court in 1984. The facts of the underlying suit have been thoroughly briefed by the parties in the Petition for a Writ of Certiorari and in the Cross-Petition. *See* Cross-Pet. at 3-8. The Cross-Petition seeks review of the specific language employed in the Fifth Circuit's Eleventh Amendment analysis,[1] claiming a "conflict" exists among the circuit courts.

This "conflict," however, involves nothing more than a once-existing academic debate (since resolved by this Court) over the relative significance of factors in the "arm-of-the-state" analysis. In truth, the Cross-Petition merely clouds the issues presented in the original Petition for a Writ of Certiorari related to the Fifth Amendment's Takings Clause. Indeed, the attendant briefing on the Eleventh Amendment issue would be cumbersome and unnecessary, as no actual "conflict" exists.

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[1] The Cross-Petition is directed only at the Fifth Circuit's holding that TEAJF is entitled to immunity. There is no challenge to the immunity of W. Frank Newton.

From the outset, the parties have focused attention on the constitutional attack on the existence of the Texas IOLTA program. At the district court, and again at the Fifth Circuit, the Eleventh Amendment was of only minor concern. Both courts found that the Eleventh Amendment immunized TEAJF from suit in federal court without its consent. Specifically, in the district court, Cross-Petitioners challenged the Texas Supreme Court and its Rule bringing TEAJF into existence. The district court held that TEAJF acts as an agent of the Texas Supreme Court and occupies the position of a public agency for purposes of the Eleventh Amendment. Pet. App. 38a. Cross-Petitioners had argued that TEAJF was not an arm-of-the-state absent evidence that the state treasury would be liable for money judgments entered against TEAJF.

While the Eleventh Amendment issue was again raised at the Fifth Circuit, that court commented on the "lackadaisical approach" of the parties in pursuing the issue. In short order, the court held that Eleventh Amendment immunity clearly applied. The Cross-Petition makes much of the language and analysis employed by the Fifth Circuit in reaching this holding, claiming that the succinct opinion is somehow in "conflict" with the analysis employed by other courts of appeals. It is on the basis of this contrived "conflict" that Cross-Petitioners seek review in this Court.

REASONS FOR DENYING THE WRIT

INTRODUCTION AND SUMMARY

In their Conditional Cross-Petition, Washington Legal Foundation and the other Cross-Petitioners (hereafter collectively "Cross-Petitioners") urge the Court to resolve "the conflict among the circuits regarding how to evaluate claims that an entity is an 'arm of the state' entitled to Eleventh Amendment immunity." (Cross-Pet. at 8). In fact, there is no conflict. The Cross-Petitioners have strained to create the impression that a conflict exists by finely parsing the opinion in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 115 S. Ct. 394 (1994), which involved a bi-state entity, and by selectively focusing on nuances in the way the lower courts have applied *Hess's* language in the more typical situation involving only a single state.

At most, the Cross-Petition addresses supposed "confusion," outside the bi-state entity context, over the relative "importance" of one of the "factors" cited by the Court in *Hess*.[2] This academic debate does not amount to a conflict, was not addressed by the court or the parties in this case and, in any event, appears already to have been resolved by this Court. *Regents of Univ. of Cal. v. Doe*, ___ U.S. ___ , 117 S. Ct. 900, 904-05 (1997) (applying state treasury factor of *Hess* to single-state entity). The argument Cross-Petitioners seek to advance on the tentative

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[2] In *Hess*, the Court stressed "Bi-state entities occupy a significantly different position in our federal system than do the States themselves," and ultimately found that no immunity existed. 115 S. Ct. at 400. The holding is clear and has not created any "confusion" among the lower courts.

strength of this "conflict" – that immunity cannot exist unless a judgment would be satisfied directly from the state treasury – is one that has *not* "confused" the lower courts or created any conflict, real or imagined. Indeed, it was rejected by this Court in *Seminole Tribe* when it held two Terms ago that "The Eleventh Amendment does not exist solely in order to 'preven[t] federal court judgments that must be paid out of a state treasury.' " *Seminole Tribe of Fla. v. Florida*, ___ U.S. ___, 116 S. Ct. 1114, 1124 (1996). Granting the Cross-Petition would do little more than unnecessarily expand the issues before the Court in this case.

1. The Fifth Circuit Did Not Reject *Hess*

Far from announcing some radical departure from any rule laid down in *Hess*, even a cursory examination of the decision below confirms, as the Cross-Petitioners concede (Cross-Pet. at 9), that the Fifth Circuit never even cited *Hess* or had any occasion to depart from its holding. Cross-Petitioners, in artfully-crafted language, suggest that the Fifth Circuit has "taken the position" that *Hess* applies only to bi-state entities and has "*no relevance*" to the immunity of entities created by a single state. *Id.* (emphasis added).

Cross-Petitioners cite an earlier Fifth Circuit decision, *Pillsbury Co. v. Port of Corpus Christi Authority*, where the court held that *Hess* had not overruled an earlier opinion in which the Port Authority of Houston was found to be entitled to Eleventh Amendment immunity. 66 F.3d 103, 104 (5th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1705 (1996). The Fifth Circuit panel went on to discuss the

holding of *Hess* in *dicta*: "[w]e view *Hess* as a limited holding addressing the standard to be applied to bi-state entities not created pursuant to state statute." *Id.* This *dicta* is hardly surprising given *Hess's* own recognition that "Bi-state entities occupy a significantly different position in our federal system than do the States themselves." 115 S. Ct. at 400. Regardless, nowhere in this decision (or any other opinion) did the Fifth Circuit ever suggest (as Cross-Petitioners now claim) that any of the *"factors"* driving the *holding* in *Hess* were "irrelevant."[3] In fact, just the opposite is true. The Fifth Circuit has repeatedly applied the state-treasury factor, even where the entity in question was the creation of a single state. *Green v. State Bar of Tex.*, 27 F.3d 1083, 1087 (5th Cir. 1994); *Delahoussaye v. City of New Iberia*, 937 F.2d 144, 147-48 (5th Cir. 1991) (listing state-treasury factor as "most significant").

Exactly where or how the Fifth Circuit in this case has "taken the position" that any factor employed in *Hess* is "irrelevant" in the single-state (or any other) context is a mystery. *See* Pet. App. 1a-19a. Indeed, no mention of such a distinction is even made. Instead, the Fifth Circuit makes short work of the argument that an agency created by a state supreme court to effectuate a court ruling is not entitled to immunity.[4] Though it makes no mention of

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[3] This Court's denial of certiorari despite the explicit *dicta* concerning *Hess* (absent here) of course does not carry any precedential effect and should not be taken as an indication that the Court found no need to clarify any deficiency in "language" either in *Hess* or this opinion.

[4] In fact, the Fifth Circuit makes note of the parties' "lackadaisical approach" to the Eleventh Amendment argument. Perhaps the Court's perception was driven in part by

Hess, it certainly suggests no confusion over the proper analysis.

Thus, at most, the Cross-Petition seeks to present the question of a supposed conflict among the other circuits over the relative importance of language in *Hess* as it relates to state agencies. As explained below, no such conflict exists. Moreover, to the extent the language in *Hess* has created "confusion" on this issue, this Court has already resolved it.

2. Neither the Fifth Circuit's Holding Nor Those Cited By the Cross-Petitioners are in Conflict With Any Other Decision

The Fifth Circuit's *holding* below is consistent with every one of the few published decisions in which a plaintiff has attempted to argue that officials appointed by a state supreme court to effectuate a court mandate should not be considered an arm of the state. *E.g.*, *Thiel v. State Bar of Wis.*, 94 F.3d 399, 403 (7th Cir. 1996); *Lewis v. Louisiana State Bar Ass'n*, 792 F.2d 493, 497 (5th Cir. 1986) (focusing on impact on public funds); *O'Connor v. State Bar of Nev.*, 686 F.2d 749, 750 (9th Cir.), *cert. denied*, 459 U.S. 1071 (1982); *see also Bates v. State Bar of Ariz.*, 433 U.S. 350, 361 (1977) (discussing relationship between Arizona Supreme Court and Bar). Of course, the Cross-Petition does not focus on the actual holdings of this Court or of

---

the obvious inconsistency of Cross-Petitioners' argument both in this Court and below. On the one hand, Cross-Petitioners vigorously propound a Fifth Amendment case alleging action under color of state law. On the other, they attempt to suggest an absence of state action as it applies to the Eleventh Amendment.

the circuits. Rather, the Cross-Petition stresses the language and analyses in this Court's *Hess* decision and in a handful of decisions from other circuits. Most specifically, Cross-Petitioners stress the relative importance of one factor in this Court's suggested multi-pronged Eleventh Amendment test: whether a judgment would be paid from a state's treasury.

The Cross-Petition claims that the lower federal courts and commentators have been "confused" about whether this factor is still the most important where, unlike the agency at issue in *Hess*, the defendant is related to a single state. Nowhere do Cross-Petitioners suggest that this debate was even addressed in this case. In fact, all of the decisions cited by the Cross-Petitioners in support of the supposed "conflict" with the Fifth Circuit's "position" agree that the decision in *Hess* is germane.[5]

Even in the context of a single-state entity, no conflict exists among the circuits as to the applicability of the factors enunciated in *Hess* and other cases from this Court[6] to the Eleventh Amendment analysis. Contrary to Cross-Petitioners' assertions, the analyses of other circuits following *Hess* are not inconsistent with that of the

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[5] One panel of the Seventh Circuit did note that this factor may have played a greater role in *Hess*, because the entity there involved was a joint creation of several states that generated income (and satisfied debts) outside a single state's treasury. *See Thiel v. State Bar of Wis.*, 94 F.3d 399, 401 (7th Cir. 1996).

[6] *E.g., Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 1171 (1979) (analyzing factors relevant to the Eleventh Amendment inquiry in the bi-state context).

Fifth Circuit. Each considers a variety of factors.[7] While Cross-Petitioners would argue otherwise, even after *Hess*, this Court itself has already noted that the payment of judgments out of the state treasury is not the sole factor in an Eleventh Amendment analysis. *Seminole Tribe of Fla. v. Florida*, ___ U.S. ___, 116 S. Ct. 1114, 1124 (1996). The Fifth Circuit's analysis is simply less detailed than those found in other circuits. Thus, while there may be some confusion in Eleventh Amendment jurisprudence as a general matter, it would seem that only the Cross-Petitioners are unable to understand *Hess*.[8]

This raises what should be a rather obvious question: how would adding the question of whether the state treasury factor is the "most" important to this case aid in its disposition? There is no indication that the Fifth Circuit disregarded this factor as "an indicator of the relationship between the state and its creation." *Regents of*

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[7] *E.g., Mancuso v. New York State Thruway Auth.*, 86 F.3d 289, 293 (2d Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 481 (1996); *Christy v. Pennsylvania Turnpike Comm'n*, 54 F.3d 1140, 1144-45 (3d Cir.), *cert. denied*, ___ U.S. ___, 116 S. Ct. 340 (1995); *Gray v. Laws*, 51 F.3d 426, 431-33 (4th Cir. 1995); *Hadley v. North Arkansas Community Technical College*, 76 F.3d 1437, 1438-39 (8th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 1080 (1997); *Sonnenfeld v. City & County of Denver*, 100 F.3d 744, 749 (10th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3572 (U.S. May 19, 1997) (No. 96-1296).

[8] The one student note Cross-Petitioners cite in support of the notion that the appeals courts are unable to devise a coherent approach to these questions was written two years before this Court's decision in *Hess* attempted to lend guidance. Note, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 Colum. L. Rev. 1243 (1992).

Univ. of Cal. v. Doe, ___ U.S. ___, 117 S. Ct. 900, 904 (1997). Instead, Cross-Petitioners seek to present a new argument – that immunity is not available if the judgment would be paid by an entity related to the state out of operating funds, regardless of whether the state treasury would ultimately be called on to replace them.

3. Cross-Petitioners' Actual Argument Is Not Worthy of Review

For reasons that are not apparent, Cross-Petitioners would narrow the inquiry to whether *Hess* would require denial of immunity (apparently with respect to single- *or* bi-state entities) unless a judgment would be paid directly from the state treasury. They do not even suggest that there has been any conflict in the lower courts over this question or that it was even presented in this case. They cite no authority from this Court or any other in support of such an absurd result. Yet they maintain that their contrived "conflict" requires resolution in this case. The position of the Cross-Petitioners is simply illogical and wrong. This Court has already refused to give the so-called "state-treasury factor" the controlling weight that Cross-Petitioners would urge if the Cross-Petition were granted. *Seminole Tribe of Fla. v. Florida*, ___ U.S. ___, 116 S. Ct. 1114, 1124 (1996) ("The Eleventh Amendment does not exist solely in order to 'prevent federal court judgments that must be paid out of a state's treasury' ") (quoting *Hess*). In fact, even *Hess* suggests that where, as here, the continued existence of the entity would be

threatened by the litigation itself were it not for additional financial backing of the state, the judgment perforce expends itself against the state's treasury. *Hess*, 115 S. Ct. at 405 (citing *Morris v. Washington Metro. Transit Auth.*, 781 F.2d 218 (D.C. Cir. 1986)).

Further, it is difficult to imagine how this case would be an appropriate vehicle for addressing this argument. While Cross-Petitioners apparently have some philosophical motivation, they have no cognizable interest at stake. Even they concede (Cross-Pet. at 20) that there are just a few hundred dollars at stake. In fact, they have no money at stake; their funds could have earned no net interest at all were it not for the aggregation in an IOLTA account. This Court has traditionally refused to involve itself (for a host of salient reasons) in cases in which the parties do not have any real injury or other concrete motivation to pursue the issues. Legal questions presented to the Court should "be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 542 (1986).

4. This Court has Already Applied the *Hess* Factors to Single-State Entities

To the extent the Cross-Petition and commentators[9] truly seek clarification of the role the state treasury "factor" plays in the context of single-state entities, that question was

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[9] *E.g.*, Carlos M. Vazquez, *What is Eleventh Amendment Immunity*, 106 Yale L. J. 1683, 1806 (1997).

answered rather emphatically in *Regents of Univ. of Cal. v. Doe*, ___ U.S. ___, 117 S. Ct. 900, 904-05 (1997). In that case, the Ninth Circuit had denied immunity to the University, because a federal agency had agreed to indemnify it. This Court applied *Hess* and concluded that the University remained immune, reaffirming that it is the *potential effect* of a judgment[10] that is significant in determining the relationship between the entity and the state.

In sum, the Cross-Petitioners' "conflict" is illusory and insubstantial. Further, the rule Cross-Petitioners wish the Court to consider (1) has nothing whatever to do with this case or the supposed "conflict" they advance and (2) finds no support in this Court or any other. This Court should adhere to its usual role of resolving actual conflicts and issues presented in the case under review. *Holly Farms Corp. v. NLRB*, ___ U.S. ___, 116 S. Ct. 1396, 1402 n.7 (1996). Moreover, the Court should refrain from review of the particular language or analyses employed by the lower courts. Although, Cross-Petitioners make much of this "conflicting" language, it has long been true that "this Court reviews judgments, not opinions." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

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[10] Hence, one would assume that a payment out of the budget of the University would have required replacement by the state.

CONCLUSION

The Cross-Petition does not identify any conflicting holdings of the lower courts. Neither does it suggest any conflict between the decision below and any other decision. Instead, it suggests that there has been a conflict in language and analyses in lower court opinions regarding the state-treasury factor as applied to single-state entities in Eleventh Amendment jurisprudence. As even this pedantic "conflict" has been resolved (and in any event played no role below), it is not in the interest of the Court or the parties to grant the Cross-Petition. The Cross-Petition should therefore be denied.

Respectfully Submitted,

NANCY TREASE
Office of the Attorney General of Texas
P.O. Box 12548, Capitol Station
Austin, TX 78711
(512) 475-4075

Attorneys for Petitioners Hon. Thomas R. Phillips, Hon. Raul A. Gonzalez, Hon. Jack Hightower, Hon. Nathan L. Hecht, Hon. Lloyd Doggett, Hon. John Cornyn, Hon. Bob Gammage, Hon. Craig T. Enoch, and Hon. Rose Spector

DARRELL E. JORDAN
H. ROBERT POWELL*
BRITTAN L. BUCHANAN
DAVID J. SCHENCK
BETH W. BIVANS
HUGHES & LUCE, L.L.P.
111 Congress, Suite 900
Austin, TX 78701
(512) 482-6800

Attorneys for Petitioners Texas Equal Access to Justice Foundation, and W. Frank Newton, in His Official Capacity as Chairman of the Texas Equal Access to Justice Foundation

**Counsel of Record*

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No. 96-1766

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

WASHINGTON LEGAL FOUNDATION, WILLIAM R. SUMMERS, AND MICHAEL J. MAZZONE,
Cross-Petitioners,

v.

TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION, W. FRANK NEWTON, THOMAS R. PHILLIPS, RAUL R. GONZALEZ, NATHAN L. HECHT, JOHN CORNYN, CRAIG T. ENOCH, ROSE SPECTOR, PRISCILLA R. OWEN, JAMES A. BAKER, AND GREG ABBOTT,
Cross-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

CROSS-PETITIONERS' REPLY BRIEF

MICHAEL J. MAZZONE
9 Greenway Plaza
Suite 2300
Houston, TX 77046
(713) 940-6001
Pro Se

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave, NW
Washington, DC 20036
(202) 588-0302

DONALD B. AYER
THOMAS M. FISHER
JONES, DAY, REAVIS & POGUE
1450 G St., NW, Suite 700
Washington, DC 20005-2088
(202) 879-3939

Attorneys for Petitioners WLF and William R. Summers

Date: June 10, 1997

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ARGUMENT 1

CONCLUSION 7

TABLE OF AUTHORITIES

Page

Cases:

Hess v. Port Authority Trans-Hudson Corp.,
115 S. Ct. 395 (1994) . . . . . *passim*
Independent Enterprises Inc. v.
Pittsburgh Water and Sewer Authority,
103 F.3d 1165 (3d Cir. 1997) 2, 3
Gray v. Lewis,
51 F.3d 426 (4th Cir. 1995) 2
Mancuso v. New York State Thruway Authority,
86 F.3d 289 (2d Cir.),
cert. denied, 117 S. Ct. 481 (1996) 2, 6
Pillsbury Co. v. Port of Corpus Christi Authority,
66 F.3d F.3d 103 (5th Cir. 1995), *cert.*
denied, 116 S. Ct. 1705 (1996) 3, 6
Regents of University of California v. Doe,
117 S. Ct. 900 (1997) 6
Sonnenfeld v. City and County of Denver,
100 F.3d 744 (10th Cir. 1996), *cert. denied*,
65 U.S.L.W. 3572 (U.S. May 19, 1997) 2

Constitution:

U.S. Const., Amend. XI . . . . . *passim*

CROSS-PETITIONERS' REPLY BRIEF

The brief in opposition asserts that there is no conflict within the courts of appeals regarding issues raised in the Cross-Petition, and further asserts that any such conflict is irrelevant to the outcome of this case. Cross-Respondents are demonstrably wrong on both counts. Moreover, Cross-Respondents do not dispute any of the factual premises upon which the Cross-Petition is based.

Most importantly, Cross-Respondents do not contest that the Fifth Circuit, in its arm-of-the-State analysis, refused to accord any weight to the absence of evidence that money judgments entered against the Texas Equal Access to Justice Foundation would be payable from the Texas treasury. That refusal is in direct conflict with the approach of numerous other courts of appeals, which have looked to such evidence as the *most important* factor in Eleventh Amendment arm-of-the-State determinations.

ARGUMENT

1. Cross-Respondents Texas Equal Access to Justice Foundation, *et al.* (collectively, "TEAJF"), do not contest that Cross-Petitioners Washington Legal Foundation, *et al.* (collectively, "WLF"), raised in the lower courts the precise issue they seek to press in this Court. *See* Opposition Brief at 2. Citing *Hess v. Port-Authority Trans-Hudson Corp.*, 115 S. Ct. 395 (1994), WLF argued in both the district court and the court of appeals that, in the absence of *any* evidence that money judgments against TEAJF would be payable from the State treasury, TEAJF was not entitled to Eleventh Amendment immunity as an arm of the State of Texas. The lower courts' failure to address that issue in their written decisions serves only to highlight the need for review of the issue by this Court.

2. Nor does TEAJF's Opposition dispute that there is no evidence in the record suggesting that a judgment against TEAJF would be payable from the Texas treasury. Indeed, TEAJF has *never* argued -- either here or in the courts below -- that any judgment would be so payable. Accordingly, this Cross-Petition squarely raises the issue of whether and when a State entity can be deemed an arm of the State for Eleventh Amendment purposes in the absence of evidence that a judgment against the entity would be payable from the State treasury.

3. TEAJF's assertion that there is no conflict among the courts of appeals on that issue is demonstrably wrong. The Second, Third, Fourth, and Tenth Circuits -- contrary to the courts below -- would almost certainly deny Eleventh Amendment immunity to TEAJF under the facts of this case. Each of those courts of appeals has (based on *Hess*) attached overriding significance to the "State treasury" factor in determining whether a State-created entity is entitled to Eleventh Amendment immunity as an arm of the State. *See, e.g., Mancuso v. New York State Thruway Authority,* 86 F.3d 289, 293 (2d Cir.), *cert. denied,* 117 S. Ct. 481 (1996); *Independent Enterprises Inc. v. Pittsburgh Water and Sewer Auth.,* 103 F.3d 1165 (3d Cir. 1997); *Gray v. Lewis,* 51 F.3d 426, 431-33 (4th Cir. 1995); *Sonnenfeld v. City and County of Denver,* 100 F.3d 744, 749 (10th Cir. 1996), *cert. denied,* 65 U.S.L.W. 3572 (U.S. May 19, 1997).

In contrast, the court of appeals in this case did not even discuss the "State treasury" factor in determining that TEAJF was entitled to Eleventh Amendment immunity. Phillips Pet. App. 18a. One can conclude from the absence of such discussion -- despite WLF's reliance on the "State treasury" factor in its brief -- that the Fifth Circuit determined that evidence that the Texas treasury would not be liable for a judgment against TEAJF should not weigh

heavily in its Eleventh Amendment calculus. That determination is directly contrary to the court of appeals decisions cited above. *See, e.g., Independent Enterprises,* 103 F.3d at 1173 ("We have repeatedly held that the most important factor in determining whether an entity is an 'arm of the State' is whether any judgment would be paid from the state treasury.")(citation omitted).

4. The courts of appeals that have focused primarily on the "State treasury" factor in resolving Eleventh Amendment issues have done so on the basis of this Court's decision in *Hess*. *Hess* held that, at least in the context of bistate entities, "the most salient factor in Eleventh Amendment determinations" is whether any judgment against the entity is payable from State treasuries. *Hess,* 115 S. Ct. at 400. In light of that language, the Fifth Circuit's failure to address WLF's uncontroverted "State treasury" argument only makes sense if the Fifth Circuit had determined that *Hess*'s "most salient factor" holding was inapplicable to the instant case. And indeed, the Fifth Circuit in its prior *Pillsbury* decision had made just such a determination: it held that *Hess* is inapplicable to cases involving entities (such as TEAJF) established by a single State but rather is "a limited holding addressing the standard to be applied to bistate entities. . ." *Pillsbury Co. v. Port of Corpus Christi Authority*, 66 F.3d 103, 104 (5th Cir. 1995), *cert. denied,* 116 S. Ct. 1705 (1996). The conflict between the Fifth Circuit on the one hand and the Second, Third, Fourth, and Tenth Circuits on the other hand could not be clearer and is outcome-determinative under the facts of this case.

5. *Hess* held that in addition to being designed to protect State treasuries from federal court judgments, the Eleventh Amendment was also intended to maintain a degree of respect for State sovereignty. *Hess,* 115 S. Ct. at 404 ("the Eleventh Amendment's twin reasons for being

remain our prime guide" on immunity issues). The clearest indication that the court below thought *Hess* inapplicable to cases (such as this) involving single-state entities was its failure to address *either* of the those two factors. Rather, the appeals court held that Eleventh Amendment immunity extended to TEAJF because "the Texas Supreme Court created the TEAJF pursuant to its rule-making authority and the TEAJF acts on behalf of the Texas Supreme Court to carry out its role, which the Texas Supreme Court defined." Phillips Pet. App. 18a. The appeals court's rationale does not explain how subjecting TEAJF to suit for money damages could either endanger the Texas treasury or challenge Texas's sovereignty.[1]

Cross-Respondents protest that the court of appeals might have taken the "State treasury" factor into account in its Eleventh Amendment determination but deemed the factor unworthy of explicit mention in light of the importance of the other factors that it *did* mention. They state that Fifth Circuit decisions have on occasion taken note of the "State treasury" factor -- even in the context of single-state entities -- and thus cannot be said to have rejected alto-

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[1] If taken literally, the appeals court's rationale would extend Eleventh Amendment immunity to a considerable degree. The three factors cited by the appeals court -- (1) the Texas Supreme Court created TEAJF; (2) the Texas Supreme Court "defined" TEAJF's role; and (3) TEAJF "acts on behalf of the Texas Supreme Court" in carrying out that role -- could be cited with respect to virtually *any* entity created by a State. While recognizing that State sovereignty concerns should inform Eleventh Amendment immunity decisions, *Hess* made clear that immunity does not extend nearly so far. Thus, *Hess* denied immunity to a port authority, even though the port authority was created by New York and New Jersey to carry out a very specific role assigned to it by those states.

gether the relevance of the "State treasury" factor to Eleventh Amendment determinations. Opposition Brief at 5.

Cross-Respondents' argument misses the point of *Hess*. *Hess* sought to get away from the free-form balancing test previously employed by so many appeals courts -- whereby the "State treasury" factor was one of many factors to be considered, with few rules regarding which factors should be given greatest weight. Rather, *Hess* held, when the many relevant factors do not point in the same direction,[2] the Eleventh Amendment issue is to be determined based on two factors alone: the "State treasury" factor and concern for State sovereignty. Accordingly, it is irrelevant that the Fifth Circuit may have given some unspoken consideration to the "State treasury" factor before ultimately deciding the issue in TEAJF's favor; *Hess* requires that the "State treasury" factor (along with concern for State sovereignty) be accorded the *greatest* weight. The Fifth Circuit has held that the weighting process mandated by *Hess* is inapplicable outside the context of bistate entities; at least four other circuits disagree. The Court should grant the Cross-Petition to resolve that conflict.

6. In support of its argument that there is no intercircuit conflict regarding the meaning of *Hess*, TEAJF states, "[A]ll of the decisions cited by the Cross-Petitioners in support of the supposed 'conflict' with the Fifth Circuit's 'position' agree that the decision in *Hess* is germane." Opposition Brief at 7. That is our point exactly. The Fifth Circuit is out of step with the other courts of appeals in determining that *Hess*'s holding (that "the most salient fac-

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[2] And of course, in cases such as this -- in which there is no claim that any judgment would be payable out of the State treasury -- it will *never* be true that all factors point in favor of a grant of Eleventh Amendment immunity.

tor in Eleventh Amendment determinations" is whether any judgment against the entity is payable from a State treasury) is applicable to bistate entities only. While numerous appeals courts have expressed confusion regarding the precise meaning of *Hess* -- *see, e.g., Mancuso,* 86 F.3d at 293 ("The jurisprudence over how to apply the arm-of-the-state doctrine is, at best, confused") -- only the Fifth Circuit (in *Pillsbury*) has held it inapplicable to single-state entities. Nothing in the Fifth Circuit's brief discussion of Eleventh Amendment issues in this case so much as hints that it has abandoned *Pillsbury* and (in accord with at least four other circuits) will henceforth treat the "State treasury" factor as "the most salient factor in Eleventh Amendment determinations."

7. TEAJF suggests that whatever inter-circuit conflict may have existed regarding the meaning of *Hess* was resolved by the Court's recent decision in *Regents of University of California v. Doe,* 117 S. Ct. 900 (1997). To the extent that *Regents* touches on relevant Eleventh Amendment issues, it resolves them in WLF's favor. Citing *Hess, Regents* states, "Of course, the question whether a money judgment against a state instrumentality or official would be enforceable against the State is of considerable importance to any evaluation of the relationship between the State and the entity or individual being sued." *Regents,* 117 S. Ct. at 904. The Court's citation to *Hess* in a case involving a single-state entity is strong evidence that the Court intended *Hess*'s "most salient factor" mandate to apply to Eleventh Amendment analysis of single-state entities as well as bistate entities. *Regents* strengthens WLF's argument that it is the Fifth Circuit that has misconstrued *Hess*; by no means does it provide a rationale for permitting the Fifth Circuit's Eleventh Amendment analysis to stand.

CONCLUSION

As stated in WLF's response to the Petition in No. 96-1578, the Petition in that case should be granted in part. The Cross-Petition in No. 96-1766 should be granted as well.

Respectfully submitted,

MICHAEL J. MAZZONE
9 Greenway Plaza
Suite 2300
Houston, TX 77046
(713) 940-6001
Pro Se

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave, NW
Washington, DC 20036
(202) 588-0302

DONALD B. AYER
THOMAS FISHER
JONES, DAY, REAVIS & POGUE
1450 G St., NW, Suite 700
Washington, DC 20005-2088
(202) 879-3939

Attorneys for Petitioners WLF and William R. Summers

Date: June 10, 1997